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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY BORNELL JONES, JR.,

Defendant and Appellant.

D072870

(Super. Ct. No. SCE354717)

APPEAL from a judgment of the Superior Court of San Diego County, Herbert J. Exarhos, Judge. Affirmed in part; sentence vacated and remanded with directions.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski, Meredith White and Donald Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Larry Bornell Jones, Jr. of two counts of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b))¹ and two counts of robbery (§ 211). It found that Jones personally used a firearm in the commission of these offenses. (§§ 12022.5, subd. (a), 12022.53, subd. (b).) In bifurcated proceedings, the trial court found that Jones had been convicted of a prior serious felony that was also a "strike" prior for purposes of the "Three Strikes" law. (§ 667, subds. (a), (c).) The court also found that Jones had suffered a prior prison term and had not remained free of custody or subsequent offense for a five-year period thereafter. (§ 667.5, subd. (b).)

The court sentenced Jones to a total determinate term of 25 years four months in prison, consisting of the middle term of six years for the first assault conviction, doubled under section 667, subdivision (e)(1) (or 12 years); the low term of three years for the associated firearm enhancement; one-third of the doubled middle term for the second assault conviction (or four years); one-third of the low term for the associated firearm enhancement (or 16 months); and five years for the prior serious felony enhancement. The court imposed sentences for Jones's robbery convictions and their associated firearm enhancements, but it stayed execution of those sentences under section 654. It also stayed Jones's prior prison term enhancement.

On appeal, Jones primarily contends that a photographic lineup used by police was unnecessarily suggestive and his trial counsel was ineffective for failing to object to identifications made using the lineup. Because Jones has not shown that any such

¹ Further statutory references are to the Penal Code unless otherwise stated.

objection would have been meritorious, we reject this claim. Jones also contends this matter should be remanded for resentencing based on two since-enacted statutes that expanded the trial court's discretion to strike sentencing enhancements for firearm use and prior serious felony convictions. (See Stats. 2017, ch. 682, §§ 1, 2 (Senate Bill No. 620); Stats. 2018, ch. 1013, §§ 1, 2 (Senate Bill No. 1393).) The Attorney General concedes these statutes are retroactive to Jones's case, and we agree. We remand for resentencing and affirm the judgment in all other respects.

FACTS²

On September 29, 2015, a clerk and security guard were working at an unlicensed medical marijuana dispensary in San Diego County. The clerk had moved from Wisconsin to San Diego the week before. The security guard, an Iraqi immigrant, had years of experience working as a security contractor for the United States military and other organizations in his native country.

That evening, around 7:00 p.m., the clerk was taking a break outside the dispensary near the front door. Jones approached, and the clerk recognized him from his previous visits to the dispensary. The clerk estimated that Jones had been there around three times in the previous week. The clerk and Jones chatted for a few minutes, and the clerk mentioned he was from Wisconsin. They went inside the dispensary, where the security guard was seated on a couch. Jones gave the clerk his driver's license and

² For purposes of this section, we state the evidence in the light most favorable to the judgment. (See *People v. Osband* (1996) 13 Cal.4th 622, 690; *People v. Dawkins* (2014) 230 Cal.App.4th 991, 994.) Additional facts will be discussed where relevant in the following section.

medical marijuana recommendation. The clerk verified that Jones was in the dispensary's computer system, which stored a copy of his driver's license. The clerk logged Jones's visit, returned his documents to him, and led Jones to the back room, where the marijuana inventory was stored. Jones purchased some marijuana and left.

During the visit, the security guard paid attention to Jones because he was acting very nervous. Jones was wearing a T-shirt, gray shorts, and shiny black shoes. Both the guard and the clerk saw that Jones had a prominent tattoo on the right side of his neck.

Twenty minutes later, Jones returned to the dispensary with another person. Jones was wearing a blue hooded sweatshirt, pajama pants, gloves, and a ski mask that covered the lower part of his face. Despite this disguise, both the clerk and the security guard recognized Jones based on his physical features, including his size, complexion, eyebrows, eyes, nose, and hairline. In addition, both saw Jones's neck tattoo when he turned his head or bent down. The clerk also recognized Jones's voice, while the security guard recognized his shoes and the shorts underneath his pajama pants.

Jones was holding a semiautomatic pistol. When he entered the dispensary, he told the clerk, "Wisconsin, don't try it." The clerk had not told anyone other than Jones that he was from Wisconsin. Jones aimed the pistol at the clerk and security guard and told them to lay on the ground. He took the security guard's gun and three cell phones, while his accomplice went into the back room and grabbed multiple jars of marijuana. Jones and his accomplice left.

The security guard told the clerk that he recognized Jones as the customer who had visited the dispensary 20 minutes before. He asked the clerk if he recognized Jones as

well. The clerk looked at the computer and showed the guard Jones's driver's license. They agreed Jones was the robber. The clerk called a manager and told him the dispensary had been robbed. The manager called police.

The next day, a detective went to the dispensary and met with the clerk. The clerk had printed out a still image from security camera footage showing Jones robbing the dispensary, as well as an image of Jones's driver's license. He gave the images to the detective. The clerk later testified he had no doubt in his mind that Jones had committed the robbery.

The detective found a photograph of Jones in a police database and created a six-pack photographic lineup including Jones's photograph and five "filler" photographs. The detective testified at trial that, in choosing photographs, he was looking for some photographs that were similar to Jones and others that were different, to show a variety of individuals. The detective noted that Jones had a tattoo on his neck, which made it difficult to find a similar photograph. The detective eventually selected one photograph in which the individual may have had some writing on his neck, but the photograph showed only a shadow or smudge. Jones's neck tattoo was clear and distinct, and the detective agreed that Jones's tattoo stood out from the rest of the photographs. The detective showed the photographic lineup to the security guard and the clerk, who both immediately selected Jones. At trial, both the security guard and the clerk identified Jones as the robber as well.

A search of a residence where Jones had been living revealed a glove that appeared similar to one worn by Jones during the robbery, as well as marijuana jars from

the dispensary. Forensic testing of the glove resulted in a match with Jones's DNA. The sheriff's department obtained surveillance video from the dispensary showing the robbery and Jones's earlier visit there.

At trial, Jones presented expert testimony regarding the psychology of memory and eyewitness identification. His expert testified that witnesses can be influenced by suggestive identification practices, as well as their interactions with law enforcement and other witnesses. In closing arguments, defense counsel asserted that Jones had been misidentified, in part because of an improperly suggestive photographic lineup.

DISCUSSION

I

Ineffective Assistance of Counsel: Witness Identifications

Jones contends his trial counsel was ineffective, in violation of the Sixth Amendment, by failing to object to the admission of the out-of-court and in-court identifications made by the dispensary clerk and security guard. Jones argues that the photographic lineup was improperly suggestive and therefore any identification made using the lineup or afterward was inadmissible.

"To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citation.] 'A reasonable probability is a

probability sufficient to undermine confidence in the outcome.' " (*People v. Scott* (1997) 15 Cal.4th 1188, 1211-1212.)

We need not consider whether Jones's counsel should have objected to the suggestive photographic lineup. Because Jones has not shown that "an objection to the evidence obtained as a result of the lineup would have been successful," he cannot demonstrate a reasonable probability that an objection would have resulted in a more favorable outcome at trial. (*People v. Hart* (1999) 20 Cal.4th 546, 625; accord, *People v. Wharton* (1991) 53 Cal.3d 522, 576.)

"In determining whether a defendant's right to due process is violated by the admission of identification evidence, we consider ' "(1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances." ' " (*People v. Clark* (2016) 63 Cal.4th 522, 556 (*Clark*).) " 'If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.' " (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.)

"The defendant bears the burden of demonstrating the existence of an unreliable identification procedure." (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) If Jones had objected in the trial court, we would review the ultimate issue de novo: "A claim that an identification procedure was unduly suggestive raises a mixed question of law and fact to which we apply a standard of independent review, although we review the determination of historical facts regarding the procedure under a deferential standard." (*Clark, supra*, 63 Cal.4th at pp. 556-557.)

We first consider whether the identification procedure was unduly suggestive and unnecessary. (*Clark, supra*, 63 Cal.4th at p. 556.) Where, as here, the objection is based on the composition of the lineup, " '[t]he question is whether anything caused defendant to 'stand out' from the others in a way that would suggest the witness should select him.' " (*People v. Gonzalez* (2006) 38 Cal.4th 932, 943 (*Gonzalez*).)

Jones contends his light complexion and neck tattoo caused him to improperly stand out from the other, "filler" photographs. We agree. Jones is an African-American man with a light complexion. Four of the five filler photographs were of African-Americans with medium-dark to dark complexions. These individuals were not viable alternate choices. The fifth filler photograph was of an African-American man with a medium complexion. This man, however, did not have the same distinguishing neck tattoo that was readily apparent in Jones's photograph. While the detective testified that this individual may have had some writing tattooed on his neck, it appears in the photographic lineup to be a shadow or smudge—not a tattoo. Given that both witnesses here noted the robber's light complexion and distinctive neck tattoo, the absence of either in most of the filler photographs—and of both in all the filler photographs—caused Jones's photograph to unnecessarily stand out. Not only did his light complexion and distinctive neck tattoo suggest that witnesses should select Jones, under the circumstances of this case his photograph was the only viable option. While " 'human beings do not look exactly alike' " and " 'differences are inevitable' " (*Gonzalez, supra*, 38 Cal.4th at p. 943), the stark differences here render the photographic lineup unnecessarily suggestive. (See *People v. Caruso* (1968) 68 Cal.2d 183, 187-188.)

The Attorney General relies on *People v. Leung* (1992) 5 Cal.App.4th 482, but that opinion shows why the photographic lineup here was improper. *Leung* held, " 'It is . . . settled that a photographic identification is sufficiently neutral where the persons in the photographs are similar in age, complexion, physical features and build' " (*Id.* at p. 500.) On that basis, *Leung* concluded that the photographic lineup at issue was not unnecessarily suggestive because "all of the photographs depicted persons of similar physical characteristics," i.e., "Asian males who appeared to be approximately twenty years old with straight black hair, broad noses, small eyes and similar skin tone." (*Id.* at pp. 499, 500.) Here, by contrast, four of the five filler photographs showed individuals with completely different skin tone from Jones. None of the filler photographs depicted a prominent neck tattoo, Jones's most distinctive physical characteristic. Unlike *Leung*, the photographic lineup here was unnecessarily suggestive.

This conclusion does not end our inquiry, however. The second question requires us to consider whether " 'the identification itself was nevertheless reliable under the totality of the circumstances.' " (*Clark, supra*, 63 Cal.4th at p. 556.) "In making this determination we take into account 'such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification.' " (*Id.* at p. 558.) "Against these factors is to be weighed the corrupting effect of the suggestive identification itself." (*Manson v. Brathwaite* (1977) 432 U.S. 98, 114.) "[I]f the indicia of reliability are strong enough to outweigh the

corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth." (*Perry v. New Hampshire* (2012) 565 U.S. 228, 232 (*Perry*).)

Here, although the lineup was suggestive, the circumstances surrounding the lineup show that the identifications made by the clerk and security guard were nonetheless reliable. They were able to clearly view Jones over an extended period of time when he first visited the dispensary that day as a customer. They were also able to view Jones's distinguishing features during the robbery, including his neck tattoo, his skin tone, his eyes and nose, and his hairline. In addition, the clerk recognized Jones's voice, while the security guard recognized his shoes and the shorts underneath his pajama pants. The clerk also knew the robber was Jones based on his reference to the clerk's home state ("Wisconsin, don't try it"), which the clerk had told only to Jones. After the robbery, both the clerk and the security guard identified Jones as the robber on their own, before the suggestive photographic lineup occurred. And, when the detective performed the lineup, both the clerk and the security guard immediately chose Jones, which shows a high degree of certainty. Under these circumstances, given the strong and specific impressions the witnesses had of Jones as both a customer and the robber, as well as their pre-lineup identifications of him, the photographic lineup identification had adequate indicia of reliability.

Jones claims that using the witnesses' *pre-lineup* identifications to show that their *lineup* identification was reliable is "circular and illogical." We disagree. Both the clerk and the security guard were able to readily identify Jones before the lineup occurred—

demonstrating that their lineup identifications were not infected by the suggestive nature of the photographs. Their identifications of Jones were therefore sufficiently reliable to be considered by the jury. Jones points out that the robbery was brief and the witnesses were paying attention to Jones's pistol, among other things, in addition to his identity. These factors do not outweigh the other facts we have discussed. Jones also claims the *clerk's* pre-lineup identification was substantially influenced by the *security guard's* immediate comment that Jones was the robber. But the clerk's testimony that he saw Jones's distinctive tattoo during the robbery and heard Jones reference his home state shows that the clerk identified Jones on his own. Finally, Jones argues that the witnesses' certainty of identification should not be a factor, based on a dissenting opinion of a United States Supreme Court justice and several law review articles. (See *Perry, supra*, 565 U.S. at p. 264 (dis. opn. of Sotomayor, J.).) We are bound by the majority opinion in that matter and by our own Supreme Court's opinions, which identify certainty as a factor to be considered. (*Id.* at p. 239, fn. 5 (maj. opn.); *Clark, supra*, 63 Cal.4th at p. 558; see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Jones's argument is therefore unpersuasive.

In sum, because the lineup identifications were reliable notwithstanding the lineup's suggestiveness, they were admissible. "Having so determined, [Jones's] contentions concerning the tainted in-court identifications . . . also fall." (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.) If Jones's counsel had objected to the lineup identifications or the witnesses' in-court identifications, those objections would

have been overruled. Jones has not shown he is entitled to relief based on alleged ineffectiveness of counsel.

II

Sentencing Issues

After Jones was sentenced, the Legislature enacted two statutes, Senate Bill No. 620 and Senate Bill No. 1393, which conferred discretion on trial courts to strike sentencing enhancements based on firearm use (§ 12022.5, subd. (c), as amended by Stats. 2017, ch. 682, § 1; § 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2) and prior serious felony convictions (§ 667, subd. (a)(1), as amended by Stats. 2018, ch. 1013, § 1; § 1385, as amended by Stats. 2018, ch. 1013, § 2). Both statutes have now become effective. (See Cal. Const., art. IV, § 8, subd. (c)(1); Gov. Code, § 9600, subd. (a).)

Jones contends these statutes should be applied retroactively to him because his case is not yet final on appeal. (See *In re Estrada* (1965) 63 Cal.2d 740, 744-745; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971-972 [Senate Bill No. 1393]; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424 [Senate Bill No. 620].) The Attorney General concedes that these statutes should be applied retroactively under existing case law. (See *People v. Francis* (1969) 71 Cal.2d 66, 75-76.) We accept the Attorney General's concession for the reasons stated in *Garcia* and *McDaniels*. On remand, the trial court should resentence Jones, which would include consideration of its newly-enacted discretion to strike his prior serious felony enhancement and his firearm

enhancements. We express no opinion on how the trial court should exercise its discretion.

DISPOSITION

The sentence is vacated and the matter is remanded with directions to resentence Jones consistent with this opinion. In all other respects, the judgment is affirmed.

GUERRERO, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.